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Nos. 07-984 & 07-990

IN THE
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL MINING ASSOCIATION, ET AL. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Mining Association ("NMA") is a national trade association that represents all aspects of

[1] Pursuant to Supreme Court Rule 37.6, *amici* note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a

the mining industry, including producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal, and fuel products. These products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See* National Mining Association, *The Economic Contributions of the Mining Industry in 2005*, at 3 (2007).[2]

The NMA works with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. It also participates in litigation raising issues of concern to the mining community, *see*, *e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003), and has been involved in cases, like this one, in which parties have attempted to challenge the jurisdiction of the Army Corps of Engineers (the "Corps") to issue permits for "fill material" under the Clean Water Act. *See*, *e.g.*, *Kentuckians for the*

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monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. All petitioners and respondents except the United States have done so *via* consent letters filed directly with the Clerk; a copy of the United States' consent letter is being filed with the Clerk together with this brief.

[2] *Available at* www.nma.org/pdf/pubs/mining_economic_report.pdf.

Commonwealth v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003).

Amici the Alabama Coal Association, Arizona Mining Association, Coal Operators and Associates, Colorado Mining Association, Illinois Coal Association, Idaho Mining Association, Indiana Coal Council, Kentucky Coal Association, Nevada Mining Association, New Mexico Mining Association, Northwest Mining Association, Ohio Coal Association, Pennsylvania Coal Association, Utah Mining Association, and West Virginia Coal Association represent the interests of the coal and mining industries at the state level. Their goals are to provide effective industry leadership, enhance the industry's ability to compete, and educate citizens about the wise use of America's energy and mineral resources.

The *amici* have a substantial interest in this case. The Ninth Circuit held below that mines must obtain Section 402 effluent-discharge permits from the Environmental Protection Agency ("EPA"), instead of a Section 404 "fill" permit from the Corps,[3] anytime the excess rock and dirt produced by their operations happens to contain a substance covered by one of EPA's myriad effluent limits. The Ninth Circuit's rule is wrong not just because of its counter-textual interpretation of the Act; it is also wrong because it ignores the practical realities of mining that both the Corps and EPA carefully considered in fashioning the "fill" rule. As petitioners have correctly explained, fill material produced by mines will often contain some substance regulated by EPA's effluent

[3] Sections 402 and 404 are codified at 33 U.S.C. §§ 1342 and 1344, respectively.

limits, whether it be process water or bits of the mined metal itself. By its very nature, this voluminous fill material could never qualify for a permit under Section 402, which is designed to regulate discharges measured in parts per million, not in millions of tons. As a result, some mines—those whose topographical or environmental settings make storage within waters the only feasible method of disposal—may well be left without any legal way to store the huge quantities of excess rock their operations produce.

Brushing aside the considered judgments of the Corps and EPA—and ignoring 30 years of industry practice—the Ninth Circuit announced a rule that threatens the economic vitality of both the mining industry and the communities in this Nation that rely on that industry. Were this Court to endorse the Ninth Circuit's approach, many mines would be forced to cease operations because they could not, as a practical matter in many areas of the country, dispose of the tailings all mines inevitably generate. Such closures would jeopardize the economies of the States in which these mines operate and the livelihoods of the many men and women they employ. This Court should reverse the ruling below.

SUMMARY OF ARGUMENT

1. Respondents Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") would have this Court conceive of the mine discharge at issue here as "process wastewater" that just happens to have some particles of solid material floating in it. SEACC Brief in Opposition ("SEACC BIO") 10; *id.* at 4 n.2. That is wrong—and the inaccuracy is no small

matter. On the contrary, recognizing exactly what will be discharged into Lower Slate Lake is critical in understanding how the Clean Water Act's mutually exclusive permitting regimes under Sections 402 and 404 operate.

The Ninth Circuit recognized, and no party disputes, that the mine "tailings" placed in Lower Slate Lake would be largely solid—a slurry composed of 55 percent earth and crushed rock by weight. Pet. App. 6a. These solid materials also would be massive: 1,440 tons of tailings would be placed in the lake each day, enough to raise the lake bottom by 50 feet over the life of the project. *Id.* The tailings therefore fall squarely within the regulatory definition of "fill" jointly promulgated by the Corps and EPA in 2002—a regulation that, as petitioners correctly note, has not been challenged in this litigation. For that reason the mine is subject to the Section 404 permitting scheme designed by Congress to govern the placement of fill in jurisdictional waters.

SEACC hinges its contrary argument on the fact that the fill material happens to contain a component—process wastewater—that, standing alone, is subject to an effluent limit. But solid rock tailings that would otherwise qualify as "fill" do not lose that status merely by dint of some additional water. After all, whether deposited in the lake in dry or slurry form, the solid-rock tailings will satisfy the regulatory definition of "fill": They will raise the elevation of the lake bottom. As petitioners correctly explain, the Act's plain language creates an entirely separate regulatory scheme for "fill" and leaves the relevant agencies (EPA and the Corps) discretion to define the term. Coeur Alaska Br. 32-39. Since the

discharge at issue is squarely within the definition of "fill" that those agencies promulgated, and since that definition is not challenged here, this Court should reverse the Ninth Circuit's decision below.

2. But even if SEACC were correct that the language of Sections 301 and 306 requires all discharges—even those of "fill"—to comply with effluent limits, that would only create a conflict in the Act; Sections 301 and 306 would be at war with Section 404. SEACC has offered no reason why the expert agencies are not entitled to reasonably resolve that purported conflict. Indeed, they plainly are. And that is exactly what they did by jointly adopting the "fill" rule.

Under that definitive regulation, the agencies deemed tailings slurry—a mostly solid substance that the agencies knew full well often contains process wastewater—to be "fill" governed by the Section 404 permitting regime. That choice makes good sense. After all, tailings typically are deposited in secure impoundments designed to hold massive quantities of earth and rock. As a result they act like fill material: They raise the bottom elevation of the entire impounded water body and replace water with dry land. They thus are most naturally regulated under Section 404, regardless of the components the earth and rock might contain. At the same time, EPA and the Corps pay proper homage to Section 402 and its effluent limits: The agencies ensure that tailings do not cause impurities in *other* jurisdictional waters—those whose bottom elevations are not being altered—by treating any water that escapes from the impoundments as a source subject to Section 402. This is an eminently reasonable resolution

of any tension between Sections 301 and 306 on the one hand and Section 404 on the other. Thus even if this Court deems the Act ambiguous on the question whether "fill" containing an effluent may be regulated under Section 404, it should uphold the agencies' reasonable resolution of that question under *Chevron* step two. *See Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984).

3. SEACC's proposed approach to the regulation of fill containing effluent materials is not only wrong as a legal matter but also entirely unworkable. Tailings and other related mining byproducts, such as the "overburden" produced by surface mines, naturally contain any number of materials—from iron to manganese to "suspended solids"—that are the subject of effluent limitations. And when mines store these solid byproducts, they must do so in massive quantities—amounts that far exceed the strict parts-per-million limitations on effluent discharges that regulations applicable under Section 402 establish. The upshot of SEACC's proposed rule, in short, is to effectively (1) outlaw tailings ponds altogether and (2) render next to impossible the placement of run-of-the-mill mining byproducts, such as earth and rock, in water bodies. Such a rule, if endorsed by this Court, could shutter a number of American mines. After all, in many areas of the country—particularly where much of the land is dotted with wetlands and streams or crisscrossed with ephemeral drainages deemed to be "waters of the United States"—the *only* feasible way to store mining materials is to place them in waters that the Corps and EPA have traditionally considered jurisdictional under the Clean Water Act.

ARGUMENT

I. MINES HAVE LONG USED TAILINGS PONDS TO DISPOSE OF NATURAL MINING BYPRODUCTS, AND REGULATORS HAVE LONG PERMITTED THIS ACTIVITY UNDER SECTION 404.

A. Tailings And Related Mining Byproducts Are Nothing More Than Earth And Rock.

Mining operations dislodge large amounts of rock and earth, only a small percentage of which contain ore.[4] The initial process of separating ore-containing rock from the rest is called "beneficiation." *See* EPA, *Technical Resource Document: Extraction and Beneficiation of Ores and Minerals*, EPA 530-R-94-013, at 1-16 (Aug. 1994).[5] After beneficiation is complete, the ore-containing rock is shipped off for further processing; the material left behind is known as "tailings." Tailings are, as the Ninth Circuit acknowledged, nothing more than ground-up rock and earth. Pet. App. 4a. And they frequently have a muddy consistency because beneficiation often involves combining the mined rock and earth with water and chemicals in order to separate out ore-bearing materials. *See* EPA, *Development Document*

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[4] With copper mines, for example, "[t]he amount of marketable copper produced is small compared to the original material mined. * * * Several hundred metric tons of ore must be handled for each metric ton of copper metal produced, thus generating large waste quantities." EPA, *Copper Mining and Production Wastes*, *available at* http://www.epa.gov/rpdweb00/tenorm/copper.html.

[5] *Available at* www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/gold/goldch1.pdf.

for Final Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category 18-26, EPA No. 440/1-82/061 (Nov. 1982) ("1982 Development Document").[6] Some of that water remains mixed in the tailings after the process is complete, leaving the tailings in semi-solid or "slurry" form. *See* SER 295-296 (Knight Piesold Consulting, *Coeur Alaska, Inc. Kensington Project: Slate Creek Lakes Tailings Storage Facility Report on Water Quality Monitoring* 8-9 (Feb. 2003)).[7]

B. American Mines Long Have Disposed Of Tailings in Securely Impounded Tailings Ponds.

The mining process thus leaves mine operators with massive quantities of muddy, ground-up rock to dispose of. And while some of these tailings can be reinserted into the mine, many tons cannot. That is because "rock taken from its natural state and broken up naturally 'swells,' perhaps by as much as 15 to 25%." *Bragg* v. *West Virginia Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001). Mines therefore rely on storage facilities to hold the excess tailings.

The conventional storage method for at least the last 30 years has been to build a "tailings pond." A tailings pond is made by (1) creating an embankment or a containment dam by encircling or crossing an existing body of water, and then (2) pumping the tailings slurry into the impounded area for storage.

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[6] *Available at* http://nepis.epa.gov/EPA/html/Pubs/pubtitleOAR.htm.

[7] "SER" refers to the Supplemental Excerpts of Record filed in the Court of Appeals.

The tailings-pond method has several advantages. First, in some cases it avoids the creation of huge, unsightly mountains of tailings—mounds that can grow as high as 300 feet. Second (and as discussed further *infra* at 19-22), it may be the only feasible disposal technique in large portions of the country where the landscape is heavily dotted with wetlands, streams, or ephemeral drainages. And third, because the impoundment is securely walled off, it ensures that the solids and minerals in the tailings will not flow into a nearby water supply.

C. For At Least 30 Years, Federal Agencies Have Applied Effluent Limitations Only To Discharges *From* Tailings Ponds, Not To Deposits *Into* Tailings Ponds.

For many years, the EPA and the Corps have consistently taken a bifurcated approach to tailings ponds. On the one hand, they have authorized tailings deposits *into* the tailings ponds as "fill" under Section 404. On the other hand, they have applied Section 402 and its effluent limits[8] to any subsequent release of liquids *from* those tailings ponds that might reach non-impounded waters.

This regulatory dividing line makes good sense. Tailings are enormous in volume and are largely made up of rock. They cannot be assimilated into bodies of water like the microscopic effluents regulated under Section 402 can. Tailings instead displace water and create either dry land or a water body of a different size and shape. They therefore fall squarely into the regulatory definition of "fill material" that triggers Section 404 permitting:

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[8] *See* 33 U.S.C. §§ 1311, 1316.

material that "has the effect of * * * [r]eplacing any portion of a water of the United States with dry land" or "[c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e). And because they are largely solid, the tailings cannot possibly meet Section 402's associated effluent limitations, which typically cap mineral and solids contents in water at some small number of parts per million. *See*, *e.g.*, 40 C.F.R. § 440.104(a). These limitations, in short, were never meant to apply to tailings.

1. The EPA and the Corps have recognized for more than 30 years that mine operators, so long as they comply with Section 404, may cordon off small bodies of water and use them to store wet tailings as fill material in isolation from other water bodies. Throughout that time, the EPA and the Corps have likewise recognized that Section 402 and its associated effluent limitations do not apply to the discharge of tailings into those isolated tailings ponds. Rather, Section 402 comes into play only if there is a discharge of pollutants from the tailings-storage facility into downstream waters.

The agencies have consistently hewed to this regulatory division of labor. In 1985, the Corps issued a Section 404 permit that authorized the Red Dog mine in Alaska to place lead and zinc tailings into an impoundment made from wetlands and a creek. *See* SER 836, 978-979. Even though the tailings were discharged as slurry, and even though there is an effluent limitation for discharges from lead and zinc mines, *see* 40 C.F.R. § 440.104, only a Section 404 permit was required for deposits into the tailings pond. Discharges from the tailings pond to adjacent

non-impounded waters, however, were subject to Section 402. *See* SER 836. Likewise, in 1994 the Corps issued a Section 404 permit for the Fort Knox gold mine's tailings impoundment, established in a creek and adjacent wetlands. *Id.* at 837, 983-991. This tailings pond also did not require a Section 402 permit. *Id.* at 837.[9]

2. This same regulatory approach to tailings ponds continued through the more recent EPA and Corps rulemaking. In the 2000 document proposing the current definition of "fill material," for instance, the agencies discussed a common technique by which excess coal-mining residue ("overburden") is placed in valley streams, with dammed "sedimentation ponds" built downstream to catch and isolate any runoff from the fill. *See* 65 Fed. Reg. 21,292, 21,295 (Apr. 20, 2000). The agencies wrote that the fill and the sedimentation ponds "should be regulated under CWA section 404" while any effluent subsequently "discharged into waters of the U.S. *from* sedimentation ponds" would require Section 402 permits. *Id.* at 21,295-96 (emphasis added). The final regulations confirm this approach in clear terms. The promulgating document stated that "EPA has *never* sought to regulate fill material under effluent guidelines,"

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[9] SEACC has suggested that from 1982 "until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill—or from any other source subject to EPA effluent limitations—into navigable waters." SEACC BIO 1. Not so. As Coeur Alaska's opening brief explains, the Corps has time and again authorized Section 404 permits for mine tailings even when an EPA effluent limitation existed that would have applied had the discharged material not otherwise qualified as "fill material." Coeur Alaska Br. 40-43.

67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (emphasis added), and the regulations themselves define "discharge of fill material" to include "placement of overburden, *slurry*, or *tailings* or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2 (emphases added).

Finally, the Corps and EPA's longtime approach was never altered during the decade-long review of the Kensington project. In 1994, the EPA wrote that an earlier Coeur plan, which proposed building a tailings impoundment in a creek, implicated Section 402 in only one respect: "whether or not * * * a discharge *from the impoundment* would meet applicable effluent limits." *See* SER 446 (EPA, *Kensington Gold Mine Project: Technical Assistance Report for the U.S. Army Corps of Engineers Alaska District* v (Oct. 1994)) (emphasis added). In August 2004, the EPA likewise wrote that certain Section 402 requirements applied not to the tailings pond itself, but only to "discharge *from*" the pond "into East Fork Slate Creek." *See* SER 427 (EPA, *EPA's Detailed Comments on the Kensington Gold Project* (Aug. 2004)) (emphasis added). In June 2005, the EPA wrote that a Section 402 permit was required only for "discharge *from* the tailings storage facility." *See* SER 536 (EPA, *Record of Decision for Section 402 NPDES Permit* 3 (June 28, 2005)) (emphasis added). And in March 2006, the Corps noted that the discharge of water to the downstream Slate Creek—but not the discharge of wet tailings into the tailings pond—was subject to a Section 402 permit. *See* SER 556 (Army Corps of Engineers, *Record of Decision and Permit Evaluation* 2 (Mar. 29, 2006)). Thus, until the Ninth Circuit's decision in this case, both regulators and the industry enjoyed a clear under-

standing of how the Clean Water Act applies to tailings ponds: Section 404 applies to the discharge of tailings into segregated impoundments, while Section 402 applies to the discharge of pollutants or impurities into downstream waters.

II. EVEN IF THE ACT WERE AMBIGUOUS ON THE TREATMENT OF TAILINGS SLURRY, THE AGENCIES' RESOLUTION OF THE ISSUE WOULD STILL BE EMINENTLY REASONABLE.

Amici agree with petitioners and with the federal respondents that the Clean Water Act's plain language is dispositive: The Act creates a bifurcated permitting scheme and mandates that any material falling within the definition of "fill" be regulated by the Corps pursuant to a Section 404 permit. *See* Coeur Alaska Br. 22-29; *accord* Brief for the Federal Respondents Supporting Petitioners 13-14 ("SG Brief") ("The text, purpose, and structure of both the Act and the 2002 fill rule * * * make clear that discharges of 'fill material' are subject only to the Section 404 permitting process."). However, even if this Court were to reject that interpretation, and even if it were to further agree with SEACC that Sections 301 and 306 mandate that *all* discharges—even those constituting "fill"—meet effluent limits, that would not support the result reached by the Ninth Circuit below. Instead, it would simply create a statutory ambiguity; the agencies entrusted to fulfill Congress's commands would be left to reconcile conflicting statutory mandates. In that circumstance the Court should defer to the expert agencies' resolution of the issue—a resolution that is clear, that is of long standing, and that reasonably balances the

concerns that led Congress to create two separate permitting regimes in the first place.

1. SEACC argues that Sections 301(e) and 306(e) of the Act apply even to "fill," thus banning the placement of much fill material in jurisdictional waters unless that fill material can meet the Act's effluent limits—limits it could never possibly meet. SEACC BIO 16-24. Petitioners and the Solicitor General have cogently explained why this argument is fallacious, *see* SG Brief 23-24 (explaining why the word "and" in Section 301(a), a key to SEACC's argument, cannot bear the weight SEACC would assign to it); *id.* at 25 (debunking SEACC's reliance on Section 306(e)), and *amici* agree with their analysis. But even if SEACC's argument were correct, it would not follow that the Ninth Circuit's decision below—resolving the case in SEACC's favor at *Chevron* step one—was the right one. Instead, one would be left with an irreconcilable statutory conflict between Section 404, which authorizes the Corps to issue permits for placement of any and all "fill," and Sections 301 and 306, which (as SEACC reads them) would forbid the Corps from issuing Section 404 permits for placement of many kinds of fill.[10]

This conflict is precisely the sort of statutory ambiguity that may be resolved by expert agencies—and whose resolution thereby is entitled to judicial deference. As this Court explained just last year, when one statutory command would "implicitly abrogate or repeal" another and "[a]n agency cannot simultaneously obey the differing mandates" of the two, the

[10] Even SEACC agrees that the Act does not require mines to seek *both* Section 402 and Section 404 permits for placement of fill. SEACC BIO 19.

court is "left with a fundamental ambiguity that is not resolved by the statutory text." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007). The Court therefore looked to the relevant agency's authoritative interpretation; finding that interpretation "reasonable in light of the statute's text and the overall statutory scheme," the Court held that it was "entitled to deference under *Chevron*." *Id.* Indeed, this principle—that an agency's resolution of warring statutory mandates is analyzed under *Chevron*—is not open to serious dispute. The courts have long approached statutory-conflict questions in just this way. *See, e.g.*, *Mylan Labs., Inc.* v. *Thompson*, 389 F.3d 1272, 1281 (D.C. Cir. 2004) (noting that "the FDA was called upon to construe the statutes so as to resolve * * * two conflicts" and holding that "the FDA did so in a way that reflects a permissible construction of the applicable FDCA provisions and therefore satisfies *Chevron*").

2. This well-established principle of agency law should resolve the case in petitioners' favor even if the Court rejects petitioners' plain-language argument and even if the Court further agrees with SEACC that Sections 301(e) and 306(e) have some bearing on the matter at hand. After all, here, as in *National Association of Home Builders*, the relevant agencies "cannot simultaneously obey the differing mandates" of Section 404 on the one hand and SEACC's vision of Sections 301 and 306 on the other. 127 S. Ct. at 2534. Here, as in *National Association of Home Builders,* the expert agencies have offered an authoritative resolution of the purported statutory conflict, deciding after notice and comment that the term "fill" includes "slurry" and "tailings," both of which the agencies well knew often include effluents

otherwise governed by Section 402. 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2. And here, as in *National Association of Home Builders,* the agencies' interpretation is "reasonable in light of the statute's text and the overall statutory scheme." 127 S. Ct. at 2534. That is so because, as described *supra* at 8-10, tailings and tailing slurry are largely solid discharges that replace waters with massive quantities of dry land and that are placed at "specified disposal sites." 33 U.S.C. § 1344(a). They therefore squarely implicate the concern that animated Congress's decision to create a separate Section 404 permitting scheme in the first place—namely, a concern for "the loss of a portion of the water body itself." 65 Fed. Reg. 21,293 (Apr. 20, 2000). At the same time, the agencies have made sure to hew to Congress's goal of cleaner jurisdictional waters by applying Section 402 to discharges *from* fill placements and therefore ensuring that these placements do not affect downstream water bodies. *See supra* at 10-14. This is a wholly sensible approach to any tensions between Sections 301, 306, and 404.

3. SEACC's apparent concern with this resolution is that mines will bypass the EPA's effluent-discharge limits by mixing pollutants with a trace amount of tailings, calling it "fill," and indiscriminately releasing the combination into America's waterways. But this concern is chimerical; the agencies' approach to tailings is much more sensible than that. For at least 30 years, the EPA and the Corps have required that tailings be deposited in "specified disposal sites." 33 U.S.C. § 1344(a). In the tailings context, these typically have been secure, impounded tailings ponds that prevent the liquid components of the deposit from commingling with

surrounding waters. The tailings ponds accept huge quantities of crushed rock and dirt that indisputably change the bottom elevation and thus fall comfortably within the agencies' definition of "fill material." *See* 33 C.F.R. § 323.2(e). The Ninth Circuit's quest for a limiting principle was therefore unnecessary. Tailings ponds are well-regulated phenomena that bear no resemblance to the environmentally apocalyptic vision of companies dumping polluted water into open rivers and lakes and calling it "fill" based on some microscopic elevation change. Fill is never disposed of in the manner SEACC envisions.

Moreover, it is important to recognize that Section 404 permits are not up for grabs for all comers. To the contrary, Congress mandated that the Corps must follow guidelines jointly promulgated by the EPA and the Corps. *See* 33 U.S.C. § 1344(b). Known as the 404(b)(1) Guidelines, these standards require the Corps to determine (i) whether impacts of a proposed discharge on waters of the United States have been avoided to the maximum extent practicable; (ii) whether any remaining impacts have been minimized; and (iii) whether the discharger should compensate for unavoidable losses through restoration, creation, enhancement, or preservation of aquatic resources. *See* 40 C.F.R. §§ 230.5; 230.10(a), (d); 230.70-77. As the EPA and the Corps have recognized, the 404(b)(1) Guidelines ensure that mining operations "avoid adverse impacts and offset unavoidable adverse impacts." Army Corps of Engineers & EPA, *Memorandum Of Agreement Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines* (Feb. 7, 1990), *reprinted at* 55 Fed. Reg. 9210, 9211 (Mar. 12, 1990). SEACC's implication that the agencies' resolution of

this issue is unreasonable because it will allow mines to make end-runs around the Act is therefore unwarranted. If the Court deems the Act ambiguous, it should defer to the agencies' eminently reasonable regulation laying out the dividing line between their respective jurisdictions.

III. THE NINTH CIRCUIT'S READING OF THE ACT WOULD MAKE IT NEARLY IMPOSSIBLE FOR MANY MINES TO LEGALLY STORE THEIR TAILINGS.

Finally, it should be emphasized that this Court's decision is of great practical import to America's mines and the communities they serve (and employ). That is because the Ninth Circuit's ruling effectively adopts by judicial fiat a categorical ban on an established industry practice that—if outlawed—would make it virtually impossible, or at least extraordinarily burdensome, for some mines to legally dispose of tailings and other excess rock and dirt from their mining operations.

1. In large swaths of the nation where a significant proportion of American mines are located—Alaska, the mountain West, the Southwest, and portions of the Midwest and Appalachia—the terrain surrounding ore deposits is covered with wetlands, streams, or dry washes and arroyos. In Alaska, for example, 170 million acres, or 43 percent of the State, consist of wetlands. *See* Corps, Alaska District Website.[11] Similarly, in the Appalachian Mountains—stretching from Pennsylvania to Alabama and running through Kentucky, Virginia, and West Virginia—the bottom

[11] *Available at* http://www.poa.usace.army.mil/hm/default.htm.

of mountain hollows are the only stable locations that mines have to place excess rock. As a basic matter of topology, these hollows naturally form streams, which in turn are regulated as waters of the United States under the Clean Water Act. *See generally Kentuckians*, 317 F.3d 425. And in the Southwest, the terrain is crisscrossed with a network of small ephemeral washes and arroyos that may be deemed to be waters of the United States. Although the washes are dry during most of the year, they carry runoff after storms. *See* David W. Love & Allen Gellis, *What Decision Makers Should Know About Arroyos in New Mexico* (2001).[12] Given the mammoth scope of mining operations in this part of the country, it is virtually impossible to construct a tailings impoundment—even one that is essentially a "dry stack"—without filling one or more of these ephemeral streams or washes.

Needless to say, mining operations throughout the country—from Alaska to Appalachia and many areas in between—will often have "no practicable alternative" but to store tailings in impoundments created by walling off an existing pond, stream, or other wetland. JA 93a (Army Corps & EPA, *Response to Comments Document for Final Rule Amending the EPA's and Corps' CWA § 404 Definitions of "Fill Material" and "Discharge of Fill Material"* (May 3, 2002)). Given the broad reach of the Act, which extends not just to traditional navigable waters but also perhaps to all wetlands and streams with such a "significant nexus" to navigable waters as to affect their "integrity," *Rapanos* v. *United States*, 547 U.S.

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[12] *Available at* http://geoinfo.nmt.edu/geoscience/hazards/arroyos.html.

715, 781 (2006) (Kennedy, J., concurring in the judgment), most such wetlands and streams are subject to federal permitting requirements.

2. The panel's statutory construction renders tailings ponds unpermittable in a wide range of situations. That is because the EPA has promulgated effluent limitations for a vast number of substances commonly present in the excess rock and dirt from mines located throughout the country. For example, process water from froth-flotation mills is governed by effluent limitations not just for gold mining, but also for the mining of copper, lead, zinc, silver, and molybdenum. 40 C.F.R. § 440.104(b)(1). Likewise, coal processing operations are governed by effluent limitations capping the iron, manganese, and "total suspended solids" that may be present in the discharge. *See id.* § 434.22. Phosphate mines are governed by an effluent limitation that caps the total suspended solids that may be present in process water from those operations. *See id.* § 436.182. And the list goes on. *See generally id.* pts. 434, 440. Under the panel's reading of the Act, the tailings produced by all such mines would be subject to effluent limitations, even though they cannot possibly meet those limitations. After all, a half-solid tailings deposit will never meet a "total suspended solids" limit designed for microscopic particles measured in parts per million.[13]

The bottom line is that, under the Ninth Circuit's approach, many mines could no longer use the long-accepted tailings-pond technology. And because it is topographically impossible or exorbitantly cost-

[13] *See* 40 C.F.R. § 440.104(a).

prohibitive to avoid a "water[ ] of the United States" in areas like Alaska, the mountain West, the Southwest, and portions of the Midwest and Appalachia, a decision by this Court affirming the Ninth Circuit might well make it impossible, or nearly so, for these mines to legally dispose of their tailings. That result would not only undermine 30 years of industry practice; it would jeopardize a vital industry and the economies of the States in which these mines play such an important role. "Since prehistoric times, mining has been integral and essential to man's existence." *Surface Mining* 1 (Bruce A. Kennedy ed., 2d ed. 1990). That is as true now as ever. In these challenging economic times, and in an era when mining for minerals critical to our economy and national security is of paramount importance to so many Americans, the Court should not endorse a rule with such ruinous potential.

CONCLUSION

For the foregoing reasons, and those in petitioners' briefs, the Court should reverse the decision below.

Respectfully submitted,

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